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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/507,467	09/10/2004	Jan Van Der Linden	0218.71425	1251

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GREER, BURNS & CRAIN
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CHICAGO, IL 60606

EXAMINER

STIGELL, THEODORE J

ART UNIT	PAPER NUMBER
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3763

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	04/17/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary

Application No.

10/507,467

Applicant(s)

VAN DER LINDEN ET AL.

Examiner

Theodore J. Stigell

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3763

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 16 March 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-11,13 and 15-22 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-11,13 and 15-22 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date 3/16/2007
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Response to Amendment

Claim Rejections - 35 USC § 112

The 112 rejection has been removed in light of the amendments to the claims filed 3/16/2007.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-2, 6-7, 13, and 15-21 are rejected under 35 U.S.C. 102(b) as being anticipated by Flower (3,520,300). Flower discloses a device that could supply gas to an area comprising a supply conduit (24), which is connectable to a gas source (54) and which includes an outlet end, a porous body (32) made of a polyurethane foam rubber-like material (column 2, lines 20-25) provided at the outlet end, wherein the device is arranged to permit supply of gas through the porous body, the device includes an attachment member (22), which includes first and second surfaces (28 and the outside surface of 22 respectively) and a centrally located continuous channel (lumen of 24, 22, 30) extending therethrough, wherein the porous body is attached to the first surface and wherein the outlet end is connected to the attachment member for permitting the supply via the channel, wherein the surface of the attachment member covers substantially the porous body as seen in the first direction, wherein the member and body are

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substantially circular seen in the first direction, wherein the porous body can be semispherical (Figure 6), wherein the device includes a homogenous body and a filter (50) which filters the gas supply, wherein the gas can be carbon dioxide, and wherein the porous body is arranged to supply gas in a controlled flow and the device can be used to supply gas to a human or animal.

Claims 1-6, 13, 15, and 17-22 are rejected under 35 U.S.C. 102(b) as being anticipated by Heaton et al. (WO 99/13793). Heaton discloses a device that could supply gas to an area comprising a supply conduit (catheter not shown, page 7, line 22), which is connectable to a gas source (not shown) and which includes an outlet end, a porous body (73) made of a polyurethane foam rubber-like material provided at the outlet end, wherein the device is arranged to permit supply of gas through the porous body, the device includes an attachment member (30), which includes first and second surfaces (top and bottom surfaces of 30) and a channel extending therethrough and a sleeve (35,36) surrounding the conduit and projecting from the second surface, wherein the porous body is attached to the first surface by way of projections (32) and wherein the outlet end is connected to the attachment member for permitting the supply via the channel, wherein the porous body is about twice as thick as the attachment member (30), wherein the surface of the attachment member covers substantially the porous body as seen in the first direction, wherein the member and body are substantially circular seen in the first direction, wherein the device includes a homogenous body, wherein the gas can be carbon dioxide, and wherein the porous body is arranged to

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supply gas in a controlled flow and the device can be used to supply gas to a human or animal.

Claims 1-2, 6, 13, 15, and 17-21 are rejected under 35 U.S.C. 102(b) as being anticipated by Otis (2,637,106). Otis discloses a device that could supply gas to an area comprising a supply conduit (10), which is connectable to a gas source (not shown) and which includes an outlet end, a porous body (26) made of a polyurethane foam rubber-like material provided at the outlet end, wherein the device is arranged to permit supply of gas through the porous body, the device includes an attachment member (20), which includes first and second surfaces (ends of cylinder 20) and a centrally located continuous channel (lumen of 20) extending therethrough, wherein the porous body is attached to the first surface and wherein the outlet end is connected to the attachment member for permitting the supply via the channel, wherein the surface of the attachment member covers substantially the porous body as seen in the first direction, wherein the member and body are substantially circular seen in the first direction, wherein the device includes a homogenous body, wherein the gas can be carbon dioxide, and wherein the porous body is arranged to supply gas in a controlled flow and the device can be used to supply gas to a human or animal.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 8-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Flower (3,520,300) or Heaton et al. (WO 99/13793) in view of Heimlich (3,672,372). Flower and Heaton disclose all of the limitations as recited in claim 1, but do not teach to include a stiffening means in the form of a deformable wire in the conduit. Heimlich discloses a catheter that includes tubing (10) with a wire stiffening means (36) disposed within the conduit. Heimlich teaches that the stiffening means is useful in avoiding kinking in the flexible catheter that would inhibit the flow of fluid. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify the supply conduits of Flower and Heaton with the limitations of Heimlich to make a supply conduit that was more resilient and less likely to kink while delivering gas to the body.

Response to Arguments

Applicant's arguments filed 3/16/2007 have been fully considered but they are not persuasive.

Flower 3,520,300

In regards to the Applicant's arguments that Flowers does not disclose a continuous channel that extends through the first surface and the second surface, the Examiner respectfully disagrees. The Examiner asserts that the channel is continuous even though the channel is defined by different parts. The Examiner defines the channel as the lumen of (24) that passes through the first surface (22), the lumen of (22), and finally the lumen of channels (30). There is in no way any structure that isolates any of these parts from one another. If a fluid is passed through (24), the fluid will flow through the channel continuously without any interruptions. Therefore, the Examiner maintains that Flower does disclose a continuous channel. The Examiner also maintains that at least part of the channel is centrally located.

In response to applicant's argument that the device of Flower is not used to supply gas, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. If the flow was reversed, the device of Flower would be capable of supplying gas rather than suctioning.

Heaton WO 99/13793

In regards to the Applicant's arguments for Heaton, the examiner has changed the nature of the rejection and therefore the arguments are now moot.

103 Rejections

In response to applicant's argument that Flower/Heaton and Heimlich are nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, the references are analogous because they are all concerned with fluid flow to or from the body. Heimlich solves the problem of kinking which is an issue to all catheters that are bringing fluid into or out of the body.

Conclusion


It is the Examiner's position that the Applicant has invoked 112-6th paragraph (means plus function language) in claim 8. The Examiner is interpreting means for stiffening to include a metal wire. If this is not the Applicant's intention, appropriate correction is required.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Theodore J. Stigell whose telephone number is 571-272-8759. The examiner can normally be reached on M-F 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Nicholas Lucchesi can be reached on 571-272-4977. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.


Theodore J. Stigell


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